No. 93-1767

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

FRANK ATONIO, ALAN LEW, CURTIS LEW, JOAQUIN ARRUIZA, RANDY DEL FIERRO, CLARK KIDO, LESTER KURAMOTO, BARBARA VIERNES, as administratrix of the Estate of Gene Allen Viernes, MARGARET BACLIG, as administratrix of the Estate of Eugene Baclig, and all others similarly situated,

Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., DOLE FOODS, INC., f/k/a CASTLE & COOKE, INC., COLUMBIA WARDS FISHERIES and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DOUGLAS M. FRYER*
DOUGLAS M. DUNCAN
RICHARD L. PHILLIPS
MIKKELBORG, BROZ, WELLS & FRYER
1001 Fourth Avenue Plaza
Suite 3600
Seattle, Washington 98154
(206) 623-5890
Attorneys for Respondents

*Counsel of Record

May 19, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

TABLE OF CONTENTS

Page

I. COUNTER-STATEMENT OF THE CASE 1

A. Material Facts 1

B. The Relevant Labor Market 2

C. The Court of Appeals Decision 3

II. SUMMARY OF THE ARGUMENT 6

III. ARGUMENT 7

A. This Case Does Not Present Any Substantial Constitutional Questions 7

1. The Constitutionality of § 402(b) of the Civil Rights Act of 1991 is not of National Importance 7

2. No Significant Separation of Powers Interests Are Presented by This Case .. 9

3. Section 402(b) Does Not Raise Any Issue of Denial of Equal Protection .. 11

B. This Case is Not the Proper Vehicle for Deciding Whether §§ 104 and 105 of the Act are Retroactive 13

1. If § 402(b) of the Act is Constitutional, Question One is Moot as to These Parties 13

2. Applying Sections 104 and 105 of the Act to This Case Will Not Significantly Change the Result 14

3. The Lower Court in This Case Did Not Decide the Issue Presented by Question One 15

TABLE OF CONTENTS – Continued

Page

4. This Court Should Not Engage in a Section by Section Analysis of the Act 16

5. This Court Did Not Adopt a Procedural-Substantive Bright Line Test for Retroactivity 17

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1940) 18

Bradley v. School Board, 416 U.S. 696 (1974) 18

City of New Orleans v. Dukes, 427 U.S. 297 *(per curiam)* (1976) 11

DeGurules v. I.N.S., 833 F.2d 861 (9th Cir. 1987) 18

Estate of Reynolds v. Martin, 985 F.2d 470, *reh'g en banc denied*, 994 F.2d 690 (1993) 5, 15

French v. Grove Manufacturing Co., 656 F.2d 295 (8th Cir. 1981) 17

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 20

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 13

Katzenbach v. Morgan, 384 U.S. 641 (1966) 12

Landgraf v. USI Film Products, No. 92-757, ___ U.S. ___ (1994) 7, 9, 15, 16, 17, 18

Lockley v. Deere and Co., 933 F.2d 1378 (8th Cir. 1991) 18

New England Power Co. v. United States, 693 F.2d 239 (1st Cir. 1982) 18

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 19

Rivers v. Roadway Express, Inc., No. 92-938, ___ U.S. ___ (1994) 12, 15, 16, 19, 20

Robertson v. Seattle Audubon Society, ___ U.S. ___, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992) 10

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 10

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) ..... *passim*

STATUTES

Civil Rights Act of 1964, Title VII 3

Civil Rights Act of 1991 ..... 7, 20

Civil Rights Act of 1991, Section 104 ... 7, 13, 14, 16, 17

Civil Rights Act of 1991, Section 105 ... 7, 13, 14, 16, 17

Civil Rights Act of 1991, Section 109(c) 16

Civil Rights Act of 1991, Section 402(a) 5

Civil Rights Act of 1991, Section 402(b) ..... *passim*

LEGISLATIVE HISTORY

137 Cong. Rec. S15967-8 13

137 Cong. Rec. S15953 13

137 Cong. Rec. S15966 13

Cong. Rec. S15469, Oct. 30, 1991 8

OTHER AUTHORITIES

Supreme Court Rule 10.1(c) 16

United States Constitution, Article I § 8 10

United States Constitution, Article III § 3 10

TABLE OF AUTHORITIES – Continued

Page

United States Constitution, Fifth Amendment.....7, 13

United States Constitution, Fourteenth Amendment.....12

I. COUNTER-STATEMENT OF THE CASE

Respondents oppose the grant of *certiorari*. Question One as presented by the petition is not ripe for review. Question Two is unique to this case and does not present a question of national importance.

A. Material Facts.

The factual background for this case is set forth in this Court's prior decision in this case, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 646-648 (1989). The factual circumstances giving rise to this case are unusual, if not unique.

Respondents operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Respondents' head office and support facilities during the case period were located in Seattle, Washington and Astoria, Oregon.

The canneries' employment requirements vary with the size and duration of the salmon runs. Respondents hire employees primarily from the Pacific Northwest and Alaska. The bulk of the employees are "cannery workers," who work in the cannery on the fish processing and canning lines. Local 37 of the I.L.W.U. has jurisdiction over and a contract for these jobs. The remaining jobs at the cannery are carpenters, machinists, tender crews, longshoremen, administrative, and other support personnel. It is these non-cannery worker jobs which are at issue. The non-cannery worker jobs are covered by several union contracts. Some are non-union. The trial

court's initial opinion sets forth the facts in detail. *See* Pet. App. A-147-196.

Respondents hire all employees except those persons working on the cannery line (cannery workers) from an external labor market that is 10% non-white. For the positions at issue, respondents hired 21% non-whites in the at-issue jobs at their class canneries. Cannery workers, on the other hand, were hired through Local 37 of the I.L.W.U. The composition of Local 37 is dominated by Filipinos, as are the crews it dispatches to the canneries each summer. In addition, respondents filled some cannery worker jobs for some canneries from local populations.

B. The Relevant Labor Market.

This case is factually controlled by the labor market evidence. Petitioners in their statement of the case refer to evidence they presented at trial of industry-wide percentages of non-white workers, with only passing reference to the labor market statistics that the trial court found more accurate. *See* Pet. at p. 5-6. This presents an inaccurate view of the factual context in which this case will be presented if the petition is granted.

In its initial decision, the trial court found respondents' labor market data based on the census to be more credible than petitioners' data, which showed only that there existed a higher percentage of minorities in the cannery worker jobs than in the at-issue jobs. The court also accepted as accurate the industry-wide statistics that petitioners now cite, but found them not to be an accurate measure of the labor pool because they were distorted by

the over-representation of non-whites in the cannery work force. Pet. App. A-168-169. The court thus found as a fact that the labor pool for the at-issue jobs was approximately 10% non-white.

On appeal, the Ninth Circuit, although initially affirming, 768 F.2d 1120 (1985), granted a rehearing *en banc*, 787 F.2d 462 (1985), and, *inter alia*, remanded to the original panel, 810 F.2d 477 (1987). That panel then held that petitioners' "comparative" statistics were adequate to establish a prima facie case of disparate impact, and remanded for an examination of the business necessity of respondents' hiring practices. 827 F.2d 429 (1987).

This Court reversed and remanded that decision, holding that the comparative statistics as a matter of law could not establish disparate impact, that plaintiffs bringing claims of disparate impact against their employers' practices under Title VII of the Civil Rights Act of 1964 had to prove the impact of each practice that they attacked, and that the burden of persuasion remained at all times on plaintiffs. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

On remand, the trial court reexamined the labor market evidence, and again found the evidence based on the census data to be more credible. Pet. App. A-221-222. The court again entered judgment for respondents. On appeal, the Ninth Circuit affirmed the trial court's findings on the labor market, holding that the industry-wide statistics that petitioners now cite were inadequate as a matter of law under this Court's decision in *Wards Cove, supra, see* Pet. App. A-24-25, and that the district court's reliance on the evidence derived from the census data

was not clearly erroneous. *See* Pet. App. A-23. Thus in the factual context of this case respondents' hiring practices must be measured against a labor pool that overall is only 10% non-white.

Petitioners refer to respondents' expert's testimony that bottom line disparity existed in four of 138 at-issue job classifications. Pet. at 8-9. Such disparities could have existed on the basis of chance alone, and the trial court found that adequate non-discriminatory reasons were offered to explain such disparities. Pet. App. A-222. The Ninth Circuit held such evidence to be only minimal evidence of impact and that there was no causal connection shown between such disparities and any of the employer practices. Pet. App. A-26, 28. These bottom line disparities in the context of this case are without legal significance.

Petitioners' statement that respondents destroyed job applications while the case was pending involves an evidentiary matter that is irrelevant to whether the petition should be granted. The trial court considered the evidence, but refused to draw an inference from it. Pet. App. A-223-224.[1]

---

[1] The ruling was within the court's discretion. The Court of Appeals affirmed the holding that the applicant flow data was less credible than respondents' labor market statistics. The applications contained no data that was job specific. *See* Pet. App. A-25-26.

C. The Court of Appeals Decision.

The Civil Rights Act of 1991, 105 Stat. 1071, ("the Act") was passed while this case was pending in the Ninth Circuit following petitioners' appeal of the trial court's decision on remand. Sections 104 and 105 of the Act were intended to change the method of analysis set down in the *Wards Cove* case insofar as it related to the burden of proof on issues of job relatedness and business necessity. The Act also relieves employees of the need to prove that specific practices caused disparity if the employees can prove instead that the elements of the employer's decisionmaking process make them incapable of separate analysis. The Act does not otherwise relieve employees of the burden to prove impact and causation. Section 402(b) of the Act, which is the subject of petitioners' challenge, dictates that no provisions of the Act are to be applied to a narrow class of cases. Respondents do not dispute that § 402(b) was passed with this case in mind, and that this case is apparently the only case to which it would apply.

The Court of Appeals did not separately analyze the retroactivity of Sections 104 and 105 of the Act. Instead, it followed its own earlier decision in *Estate of Reynolds v. Martin*, 985 F.2d 470, *reh'g en banc denied*, 994 F.2d 690 (9th Cir. 1993), *overruled, Landgraf v. USI Film Products*, No. 92-757, ___ U.S. ___ (1994), which held that the statutory language of the Act expressed a clear congressional intent that the entire act be applied retroactively. Pet. App. A-10. Having concluded that §§ 104 and 105 were thus retroactive, the court was forced to confront three challenges to the constitutionality of § 402(b) of the Act. The court held that § 402(b) did not present any separation of powers issues because it does not dictate the result. Pet.

App. at A-12-13. The court further held that § 402(b) did not violate Fifth Amendment due process because it did not classify by race, and that it was rationally related to a legitimate governmental interest. Pet. App. at A-13-15. Proceeding to the merits, the court affirmed the trial court's findings on the labor market, but the court also held that its earlier decision at 827 F.2d 439 (1987) (Atonio II), holding that separate hiring channels, race labelling and segregated housing were established, was unaffected by this Court's intervening decision reversing and remanding Atonio II. The court reasoned that this Court's decision was limited to Atonio II's holding on the petitioners' comparative labor market statistics. Pet. App. A-33 n.14.

Based on its reading of *Wards Cove*, the court remanded with instructions that the trial court must now determine whether the fact of separate hiring channels deterred the individual claimants from applying for at-issue jobs, whether one particular alternative to respondents' housing practices was feasible, and whether such labelling created any disparate impact. Respondents do not concede that these rulings were correct, but they are not before this Court on the present petition.

II. SUMMARY OF THE ARGUMENT

The effect of § 402(b) of the Civil Rights Act of 1991 is to make new legislation neutral to the outcome of this case. It therefore presents no separation of powers issues. The section also does not interfere with fundamental

rights, nor does it proceed along suspect lines. It therefore does not raise any Fifth Amendment equal protection concerns.

This Court need not decide the retroactivity of §§ 104 and 105 of the Civil Rights Act of 1991 at this time. That issue is not yet ripe for decision in this particular case.

III. ARGUMENT

A. This Case Does Not Present Any Substantial Constitutional Questions.

1. The Constitutionality of § 402(b) of the Civil Rights Act of 1991 is not of National Importance.

Whether § 402(b) of the Act is unconstitutional is of limited national importance. The parties agree that it applies only to this case. It is a comparatively minor and narrow provision of a long and complex statute. *See Landgraf v. USI Film Products*, No. 92-757, ___ U.S. ___, Slip Op. at 13 (1994). The circumstances which gave rise to its passage are sufficiently rare that they are not likely to recur in any significant numbers.

Sections 104 and 105 of the Act were specifically intended to overrule an earlier decision in this case, where this Court set down the principles for analyzing the facts of this case in deciding petitioners' disparate impact claims of discrimination. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The Court remanded for further proceedings. In the face of these results, petitioners,

with the assistance of Senator Brock Adams, whose former law firm had been their trial counsel, assiduously lobbied Congress to change the result in this case, asserting as fact allegations they had been unable to sustain in court. *See* Cong. Rec. Oct. 30, 1991 S15469 (letter from Frank Atonio).[2] The Act is expressly intended to modify the *Wards Cove* decision, *see* 105 Stat. 1071 §§ 2(2), 3(2) and 3(4), and Sections 104 and 105 in fact do modify it in part. Congress also recognized, however, that this case was still pending, and decided as part of a compromise to insure passage of the bill that the new standards of proof under the Act should not be injected into this case. The likelihood that such unusual circumstances will arise in the future is slight, and argues against this Court devoting its time and energy to the issues of this case.

Moreover, concerns of fairness do not add to the importance of this case. This case was tried in 1982, the evidence was twice examined by the trial court, and the trial court twice concluded that respondents did not discriminate, but rather that they hired more minorities than the labor market would predict. For Congress to have decided to refuse to let petitioners have yet one more bite at the apple under newly prescribed standards is not unfair.

---

[2] It was in the face of this effort that respondents lobbied for insertion of § 402(b), to assure that the case would not have to be reexamined under new standards if Congress saw fit to change the law.

2. No Significant Separation of Powers Interests Are Presented by This Case.

Section 402(b) does not present any significant issue concerning the separation of powers under Article III. This section is a comparatively minor and narrow part of a long and complex statute, *see Landgraf, supra*, Slip Op. at 13, that was intended to change and to expand the civil rights laws, without any express declaration as to whether the individual sections should be applied prospectively or retroactively. Although § 402(b) was undoubtedly passed with this case in mind, it does not require the courts to reach any particular result under the Act, or under the law as it existed before Congress passed the Act. To the contrary, its purpose is just the opposite. In the face of a statute which generally requires that the courts decide how to apply the new law to pending cases, § 402(b) merely declares that the new statute is not to apply to a narrow class of cases. The courts were free to find facts and to apply law to those facts, without regard to the result.

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), cited by petitioners, is readily distinguishable. Congress there had enacted a statute that "den[ied] to pardons granted by the President the effect which this Court had adjudged them to have." 80 U.S. (13 Wall.) at 145. The act thus violated the doctrine of separation of powers in two respects. First, it required the Supreme Court to dismiss cases for want of jurisdiction in any case where the fact of the pardon existed, thus dictating the result of those cases in favor of the government, and interfering with the judicial function of this Court. Second, by denying effect

to the pardon, it circumvented the President's plenary constitutional power to grant pardons. Section 402(b) has no effect on the executive department, and does not require the judiciary to decide the instant case in favor of either party. It simply requires that cases that come within its scope be decided without reference to changes in the law enacted in 1991.

The two other cases that petitioners cite are inapposite. In those cases, this Court found Congress had not raised any Art. III § 3 concerns. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), Congress enacted a law that allowed the Sioux Nation to assert a claim against the United States, for the taking of the Black Hills from the Great Sioux Reservation, that had already once been finally adjudicated, and required it to be decided on the merits, without reference to the defenses of res judicata or collateral estoppel. This Court held that statute merely to be a waiver of a defense and within the Congress's power to pay the nation's debts under Art. I § 8 cl. 1. This Court found the statute to be consistent with *Klein*, and not a violation of Art. III § 3.

In *Robertson v. Seattle Audubon Society*, ___ U.S. ___, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992), also cited by petitioners, plaintiffs in two cases had challenged timber cutting in areas inhabited by spotted owls, alleging that the harvests violated several state statutes. As part of the Northwest Timber Compromise, Congress enacted a statute that temporarily amended the environmental statutes to eliminate the statutory support for plaintiff's claims, which were then pending in the district courts. This Court held that the statute, even though it specifically referred to the two pending cases, did not raise Article III

concerns because it was a permissible change in the law and not a legislative direction that the courts reach a particular result in the pending cases.

The import of § 402(b) is quite different than any of the cases where this Court has addressed Article III separation of powers concerns. It does not change the law or the facts applicable to this case. Quite the opposite, it mandates that the changes in the law enacted in the Civil Rights Act of 1991, some of which were specifically intended to overrule a prior decision in this very case, not be applied to this case. As the Ninth Circuit correctly observed, § 402(b) leaves the courts free to determine the outcome of this litigation with all the latitude they would have had if the 1991 Act had not been passed.

3. Section 402(b) Does Not Raise Any Issue of Denial of Equal Protection.

For a statute to raise issues of equal protection it must interfere with fundamental rights or proceed along suspect lines. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 *(per curiam)* (1976). Section 402(b) does neither.

Petitioners here filed their case in 1974 and tried it in 1982. The case has been reviewed once by this Court and several times by the Court of Appeals for the Ninth Circuit and the trial court reexamined the evidence on remand in 1991. The provision of the 1991 Act that petitioners challenge would merely prevent them from relitigating the case under the new standard of the 1991 Act.

Petitioners rely heavily on the fact that Congress perceived this Court's decision in this case to be wrong. That fact is irrelevant. This Court has recognized that Congress is allowed wide latitude in correcting problems it perceives to exist, and may do so in measured steps. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966). And in *Rivers v. Roadway Express, Inc.*, No. 92-938, ___ U.S. ___ (1994), this Court held that even when Congress expressly intends a statute to supersede a rule of law laid down in an earlier decision of this Court, it will not be given retroactive effect unless Congress also expresses in the statute a clear intent that it be so applied. Petitioners have no fundamental right to take advantage of changes in the law enacted long after their case was first heard on the merits.

In addition, § 402(b) is not, as petitioners argue, "conspicuously racial in scope." Pet. at 25. It is not racial at all. As the Ninth Circuit correctly recognized in the decision below, § 402(b) does not target any racial class or other category subject to special constitutional protection, but rather a particular class of cases pending at the time the Act was passed. Indeed, except as it pertains to this specific litigation, both petitioners and respondents are subject to the terms of the Act.

Petitioners also misstate the basis on which governmental interest must be weighed when applying equal protection principles to an act of Congress. The Court must look not just to the effect of § 402(b), but to whether any of the governmental interests of this long and complex statute are furthered by its inclusion. Moreover, even when the selectivity of the statute would violate equal protection concerns of the Fourteenth Amendment Equal Protection Clause if passed by a State, if the statute serves

any overriding national interest it will not violate the equal protection concerns of the Fifth Amendment guarantee of due process. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Congress here perceived the Act as strengthening and improving the federal civil rights laws. This serves such an overriding national interest. § 402(b) was included in the Act as part of a compromise between leaders of the civil rights community and the Bush Administration to insure passage of the Act. *See* 137 Cong. Rec. S15966 (daily ed. November 5, 1991); *see also* 137 Cong. Rec. S15953, S15967-8 (daily ed. November 5, 1991).

Petitioners are also incorrect in stating that the purpose of § 402(b) is to afford respondents an edge in this litigation. Respondents have no more or no less of an advantage after passage of the Act than they did before. The effect of § 402(b) is thus to make the new legislation neutral to the outcome of this case.[3]

B. This Case is Not the Proper Vehicle for Deciding Whether §§ 104 and 105 of the Act are Retroactive.

1. If § 402(b) of the Act is Constitutional, Question One is Moot as to These Parties.

Section 402(b) of the Act provides that regardless of whether particular sections are retroactive, no part of the

---

[3] The same would not be true, however, if § 402(b) had expressly declared that the terms of the Act *were* to be applied to this case. In that eventuality, the petitioners might be afforded an edge by requiring that the evidence presented at trial be re-examined under different standard of proof than existed at the time the evidence was presented.

Act is to be applied to certain cases, of which this case is apparently the only one.[4] If that section is valid, then §§ 104 and 105 of the Act cannot be applied to the facts of this case. Thus if the Court were to grant *certiorari*, the focus of the parties will necessarily be on the constitutional issue, which is potentially dispositive of the case. A decision upholding the effect of § 402(b) will render meaningless to these parties any decision on the retroactivity of §§ 104 and 105 of the Act.

2. Applying Sections 104 and 105 of the Act to This Case Will Not Significantly Change the Result.

Petitioners argue that applying §§ 104 and 105 of the Act to this case would allow them to utilize their discredited industry-wide statistics to prove "bottom line disparity" under § 105(a)(k)(1)(B)(i).[5] The Act does not so provide.

Respondents do not concede that the challenged practices cannot be separated for analysis. Even if this were so, however, the industry-wide statistics were

---

[4] Petitioners contended in the Court of Appeals that § 402(b) did not apply to this case, *see* Pet. at 17 n.4, but in the face of unambiguous legislative history on this issue, the court correctly held otherwise. App. A-9 at n.3.

[5] " . . . [T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, *except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice* (emphasis added)."

rejected because they did not adequately reflect the labor pool for the jobs at issue. Pet. App. A-24. *See* Pet. App. A-168. This finding of fact will not be changed by applying the Act. The statistical evidence credited by the trial court showed no significant disparity at the bottom line.

3. The Lower Court in This Case Did Not Decide the Issue Presented by Question One.

In light of this Court's recent decisions in *Landgraf, supra,* and in *Rivers, supra,* Question One of the petition must be read to ask this Court to decide whether, in the absence of a clearly expressed congressional intent on their retroactivity, §§ 104 and 105 of the Act are "procedural," and whether they should be applied to pending cases. These issues were not addressed in the opinion of the court below, and are not ripe for review by this Court.

In ruling on the retroactivity question below, the Ninth Circuit held that Congress clearly expressed its intent in the language of the Act that the entirety of the Act was retroactive, relying on its earlier decision in *Estate of Reynolds v. Martin,* 985 F.2d 470, *reh'g en banc denied,* 994 F.2d 690 (1993). Pet. App. at A-10. In *Reynolds,* the Ninth Circuit held that the Act was unambiguous on its face in expressing congressional intent that it be applied retroactively. The court held that the qualifying language in § 402(a) of the Act[6] was superfluous unless

---

[6] "Except as otherwise specifically provided, this act and the amendments made by this act shall take effect upon enactment."

referring to sections 402(b) and 109(c), and that the language of the Act therefore clearly evidenced congressional intent that it be retroactive. This analysis was expressly rejected in this Court's decision in *Landgraf*.

Because the court of appeals concluded that the intent of Congress was clear on its face, it did not need to apply any default rule of retroactivity and therefore did not decide whether the provisions of §§ 104 and 105 "attached new legal consequences to events completed before its enactment." *Landgraf, supra*, Slip Op. at 25. It would not be a prudent use of this Court's discretion to decide an issue that the court below did not. S. Ct. Rule 10.1(c).

4. This Court Should Not Engage in a Section by Section Analysis of the Act.

In light of this Court's recent decisions in *Landgraf* and *Rivers*, retroactivity of §§ 104 and 105 of the Act is not an issue appropriate for this Court to decide at this time. In *Landgraf*, this Court held that the language of the Act did not clearly evidence an intent on retroactivity, and that the sections of the Act must be analyzed individually. The Court then set forth a rule of analysis for deciding when the courts must apply a statute retroactively. The Court provided further aids to the analysis in the companion *Rivers* decision. This Court need not apply that analysis to each section of the Act, but should leave to the lower courts the task of applying the analysis to specific factual contexts.

5. This Court Did Not Adopt a Procedural-Substantive Bright Line Test for Retroactivity.

The petition asks this Court to decide the retroactivity of §§ 104 and 105 of the Act based on whether they "are procedural in nature." Such analysis is not in accord with the decisions of this Court and is not supported by the cases that petitioners cite. Moreover, the practical effect of those sections - shifting the burden of proof on the issue of business necessity after a trial in a disparate impact case - is plainly substantive.

In *Landgraf* this Court held that when Congress does not expressly command whether a statute is to be applied retroactively or prospectively it must be applied prospectively if it has retroactive effect. Whether it is procedural in nature is not determinative. *See id.*, Slip Op. at 31 *and* n.29. Further, this Court affirmed the holding of the Fifth Circuit: "[W]e do not invalidate procedures followed before [a] new rule was adopted. 968 F.2d, at 432-433." *Id.*, Slip Op. at 3.

Petitioners argue that §§ 104 and 105 create no substantive rights or liabilities, but simply enumerate defenses. The cases they cite do not support that proposition. In *French v. Grove Manufacturing Co.*, 656 F.2d 295 (8th Cir. 1981), which petitioners mistakenly attribute to the Ninth Circuit, the Arkansas legislature had amended their Products Liability Act by adding definitions and enumerating defenses and indemnification remedies. The amendment took place two years after the accident that gave rise to the lawsuit. The Eighth Circuit, applying Arkansas law, held that the statute did not create any

new causes of action or substantive rights or liabilities, and therefore held that it should apply to the pending case. Significantly, the court recognized that the amendment did not change the law to be applied to the case. 656 F.2d at 298 n.2.

Lockley v. Deere and Co., 933 F.2d 1378 (8th Cir. 1991), also cited by petitioners, and also mistakenly attributed to the Ninth Circuit, merely cites *French* in deciding not to follow a Mississippi rule applicable to products liability cases.

DeGurules v. I.N.S., 833 F.2d 861 (9th Cir. 1987), is distinguishable. The court there decided to apply retroactively an amendment to the immigration laws that overruled the effect of this Court's decision as to what constituted "continuous physical presence in the United States." The decision had required deportation of certain aliens who had resided in the United States for more than seven years, but whose stay had been interrupted by incidental trips outside the United States. Further, the case was decided under *Bradley v. School Board*, 416 U.S. 696 (1974), without reference to *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1940), and before *Landgraf*, by applying the "manifest injustice" standard. The court found no manifest injustice by applying the statutory change to the pending case, reasoning that the change in the law did not increase the obligation on a private party but instead reduced it, and that the party adversely affected by the change in law was the United States.

New England Power Co. v. United States, 693 F.2d 239 (1st Cir. 1982), is likewise distinguishable. In that case the court upheld the Interstate Commerce Commission's

decision to apply its own newly-promulgated market dominance standards to then-pending proceedings before it challenging various rail carrier rates. The court held that the standards were jurisdictional in nature in such cases. It also held that no manifest injustice resulted, also relying on *Bradley*, without reference to *Bowen*, and before *Landgraf*. The critical facts there were that all parties were aware at the time the complaints were filed that the new standards had already been proposed and were pending, that the cases were only in the beginning stages of discovery when the rules took effect, and that the rules were not an abrupt departure from established practice.

In each of those circumstances the changes in the law either did not effect private parties, or did not change the law or the expectations of the parties concerned. Here, applying retroactively a change in the burden of proof to a case already twice decided, with only certain narrow issues left for decision, presents much different concerns.

Finally, petitioners argue that they are entitled to have their disparate impact claims evaluated under §§ 104 and 105 of the Act because they merely reinstated the standards that prevailed in 1982. Pet. at 16. Such reasoning does not justify granting the petition because this Court expressly rejected an identical contention in *Rivers*.

In *Rivers* the section of the Act in question, § 101, was also intended to overrule a decision of this Court, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Here, the sections are intended to overrule that portion of this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), dealing with the burden of proof on

business necessity. There, as here, this Court's decision did not overrule any of its prior decisions. *Wards Cove* is therefore the authoritative interpretation of the burdens of proof to be applied to disparate impact cases brought under Title VII of the Civil Rights Act of 1964, as interpreted by *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and intervening cases, both before and after it was decided, and until the 1991 Amendment took effect on November 21, 1991. This is so even if Congress read the earlier cases differently than this Court. *Rivers, supra,* Slip Op. at 14.

IV. CONCLUSION

Question One would merely require this Court to apply the analysis set down in *Rivers* and *Landgraf* to particular facts, a task best left to the lower courts. Moreover, a decision on Question One will have no bearing on the parties to this case unless the Court also decides that § 402(b) of the Civil Rights Act of 1991 is unconstitutional, a question of little national importance. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DOUGLAS M. FRYER*
DOUGLAS M. DUNCAN
RICHARD L. PHILLIPS
MIKKELBORG, BROZ, WELLS & FRYER

*Counsel of Record *Attorneys for Respondents*